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Supreme Court, U.S.
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No. ~~92-115~~

In The

Supreme Court of the United States

October Term, 1992

FRANCES LANCASTER and LARRY LANCASTER,

Petitioners,

v.

MERCHANTS NATIONAL BANK OF FORT SMITH, ARKANSAS,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

SUMMARY OF ARGUMENT

The Appellate Court's decision is not in conflict with prior decisions of this Court or Arkansas law but, rather, is amply supported by the great weight of authority and is in harmony with the strong and deeply rooted public policy in Arkansas favoring charitable trusts. Therefore, this Court should decline to entertain the Petition for Writ of Certiorari.

ARGUMENT

I. THE APPELLATE COURT'S DECISION IS NOT IN CONFLICT WITH PRIOR DECISIONS OF THE ARKANSAS COURT OR THIS COURT.

Merchants National Bank, Respondent and Trustee of the Kingsburys' trusts, submits that the Petition for Writ of Certiorari should be denied because the Appellate Court's decision is not in conflict with prior decisions of this Court or Arkansas law but, rather, is amply supported by the great weight of authority and is in harmony with the strong and deeply rooted public policy in Arkansas favoring charitable trusts. The Lancasters argue that the decision of the Appellate Court holding that the Kingsburys' trusts are charitable trusts, is in conflict with prior decisions of this Court and the law of Arkansas because, they allege, the trusts in question specifically authorize the trustee to distribute the entire principal of the trusts to any person or entity at any time, without regard to any valid charitable object. The Lancasters argue that the Kingsburys' trusts do not establish charitable trusts based upon their separate reading of paragraph 4 and paragraph 5 of the trust instruments. However, just as they have in all prior stages of this case, the Lancasters have ignored the Arkansas law providing that a court must consider the *entire* instrument and not focus on a single provision standing alone. *Curry v. Guaranty Loan and Trust Company*, 212 Ark. 988, 208 S.W.2d 465 (1948). The Eighth Circuit recognized this principle and held that, as a whole, these trusts must be interpreted to refer to and limit their application to the relief of poverty, which qualifies as a charitable purpose under Arkansas law.

The dispositive provisions of the Kingsburys' trusts are as follows:

> 4. *Dispositive Provisions, continued.* Following the death of both the Grantor and his wife, this Trust shall continue, at the sole discretion [sic] Trust's "Board of Directors" as hereinbelow defined. The Trustee is authorized to then combine the remaining corpus and undistributed income of this Trust with that of any Trust created by the Grantor's wife which specifically authorizes its assets to be combined with this Trust. Thereafter, such trusts shall be administered as one common fund. The Trustee is directed to invest and re-invest the assets of this Trust and any Trust combined herewith in such a way as to obtain the maximum income that can be obtained therefrom without significantly jeopardizing the safety of the Trust corpus. The Trustee is directed to *pay over and deliver at least 100% of the income from this Trust* and any Trust combined therewith annually or more frequently, *to one or more nonprofit entities selected by majority vote of the Board of Directors which qualify as Charitable Entities for purposes of Federal Tax Code,* so that contributions thereto are fully deductible for Federal Income Tax purposes. The Trustee is also directed *to pay over and deliver any additional sums up to and including all of the assets of this Trust to one or more individuals or entities selected by the Board of Directors regardless of whether or not contributions to such individuals or entities are fully deductible for Federal Tax purposes.* [Emphasis added.]
>
> 5. *Board of Directors.* The initial Board of Directors of this Trust shall consist of J. B. Turner, Kay Ross and Judy Fraleigh. Should any

members of the Board of Directors resign, become disabled or die, the remaining members of the Board of Directors shall be empowered to fill the vacancy or vacancies created thereby. Should all of the Board of Directors die, become disabled, or resign, then the Trustee may apply to the Chancery Court of Sebastian County, Arkansas for an Order filling the vacancies created thereby. The Board of Directors shall meet at least annually, and more frequently as it deems necessary to select one or more *individuals or entities with financial needs that are not being adequately provided for otherwise, and shall then, by majority vote, direct the Trustee to expend such sums as are appropriate to assist in meeting those financial needs.* The selection of individuals and entities to whom contributions will be made by this Trust shall be at the absolute discretion of the Board of Directors except that *the income from the Trust shall be distributed only to recipients that qualify under the Federal Tax Code* so that contributions thereto are fully deductible for Federal Tax purposes. The Board of Directors is not required to maintain this Trust in force perpetually and is *authorized to distribute any or all of the assets thereof to selected recipients in its discretion.* It is the intent of the Grantor that the *Board of Directors have the authority to either perpetuate the Trust by retaining, investing and re-investing the Corpus thereof or to terminate the Trust by distrubuting [sic] all of the Corpus thereof over whatever period of time is deemed appropriate by the Board of Directors to selected beneficiaries.* [Emphasis added.]

After analyzing the above portions of the trust documents and the governing Arkansas case law, the Appellate Court held:

> As a whole, the trust instruments must be interpreted to refer to and to limit their application to the relief of poverty, which qualifies as a charitable purpose under Arkansas law. The grantors have sufficiently indicated the class of individuals from which the Board of Directors and trustee may select individual beneficiaries, so the charitable trusts do not fail for indefiniteness.
>
> . . . Thus, in accordance with the grantors' intent and governing Arkansas law, the trusts are charitable. The trustee may, nevertheless, proceed with its action in Sebastian County Chancery Court seeking reformation of the trust instruments to more precisely reflect the charitable objects of the grantors' bounty.

Lancaster v. Merchants National Bank, 961 F.2d 713, 716 (1992), citing: *Kohn v. Pearson*, 282 Ark. 418, 670 S.W.2d 795, 796-97 (1984); *Curry v. Guaranty Loan and Trust Company*, 212 Ark. 988, 208 S.W.2d 465, 466 (1948).

The Appellate Court's decision is not in conflict with Arkansas case law, but rather, is amply supported by it as well as the *Restatement (Second) of Trusts* and other commentaries on this subject. As the Appellate Court pointed out, the Arkansas policy regarding charitable trusts was set forth in *Garrett v. Mendenhall*, 209 Ark. 898, 902, 192 S.W.2d 972, 974-975 (1946), (quoting *Russell v. Allen*, 107 U.S. 163, 166-167, 25 S.Ct. 327, 329-330, 27 L.Ed. 397, 399 (1883)):

> . . . By the law of England from before the statute of 43 Eliz., c. 4, and by the law of this country at the present day (except in those States in which it has been restricted by statute or judicial decision, as in Virginia, Maryland and more recently in New York) trusts for public charitable purposes are applied under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be construed so as to give them effect, if possible, and to carry out the general intention of the donor, when clearly manifested even if the particular form and manner pointed out by him cannot be followed. They may, and, indeed, must, be for the benefit of an indefinite number of persons; for, if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the supervision of a court of chancery.

Likewise, the Arkansas courts have consistently held that when construing a will or trust, a court must consider the entire instrument and not focus on a single provision standing alone. *Curry v. Guaranty Loan and Trust Co.*, 212 Ark. 988, 208 S.W.2d 465 (1948); *Bakos v. Kryder and Ledwidge*, 260 Ark. 621, 543 S.W.2d 216 (1976). Every part of the instrument must be considered in ascertaining the testator's intention. *Bakos, supra.* Throughout this litigation, the Lancasters have argued that the trusts in

question do not establish charitable trusts if paragraphs 4 and 5 of the trust instruments are read separately. Such an approach is impermissible under Arkansas law. As the Appellate Court recognized, the *Curry* and *Bakos* cases require paragraphs 4 and 5 of the trust documents to be read jointly, not separately, and to give consideration to the entire instrument without focusing on a single paragraph or on paragraphs standing alone.

When read together, paragraphs 4 and 5 of the trust documents make it clear that the trustee's distribution of income and corpus is limited to recipients selected by the board of directors, and the board of directors' selection of recipients is limited to "individuals or entities with financial needs that are not being adequately provided for otherwise." Clearly, the grantor's intent was to limit the distribution of trust proceeds to the relief of poverty, a charitable purpose under Arkansas law, and further, the class of beneficiaries is sufficiently definite as recipients are limited to those "individuals or entities with financial needs that are not being adequately provided for otherwise."

The Lancasters argue that the Kingsburys' trusts are not charitable because the trusts do not, they contend, sufficiently define the beneficiaries, inasmuch as they provide for virtually unlimited disposition of the trust corpus to an unrestricted class of beneficiaries. Arkansas law provides that a charitable trust is not required to be as specific in describing its distribution or as definite in its selection of beneficiaries as a private trust. In fact, as recognized by the Appellate Court, the Arkansas Supreme Court has said that the trust need only describe the general nature of the charitable trust and leave the

details of its administration to be settled by trustees under the superintendence of a court of chancery. *Curry*, 212 Ark. at 990, 208 S.W.2d at 466 (quoting *Russell*, 107 U.S. at 167). See also: *Bakos*, 260 Ark. at 625, 543 S.W.2d at 218; and *McDonald v. Shaw*, 81 Ark. 235, 242, 98 S.W. 952, 954-955 (1906). "The fact that the class is indefinite in the sense that it lacks specifically designated beneficiaries does not invalidate a charitable trust." *Bakos*, 260 Ark. at 625, 543 S.W.2d at 218-219. The *McDonald* case explains the definiteness required for a charitable trust as follows:

> They [charitable trust] may, and indeed must, be for the benefit of an indefinite number of persons; for, if all the beneficiaries are designated, the trust lacks the essential elements of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery.

McDonald, 81 Ark. at 242, 98 S.W. at 954 (quoting *Russell*, 107 U.S. at 167).

> The donor may, however, appoint trustees, and invest them with discretion to apply the fund toward a charitable purpose specified by him, leaving them, in its application, to select, from numerous persons or institutions, which shall receive the benefit of his bounty, or the testator may specify the charitable purpose in terms so general that the trustees must necessarily exercise a discretion in determining which of many purposes falling within the general description they shall seek to promote or accomplish.

McDonald, 81 Ark. at 242, 98 S.W. at 954-955 (quoting *Fifield v. Van Wyck*, 64 Am. St. Rep. 745, 771).

> It is immaterial how uncertain the beneficiaries or objects are, if the court, by a true construction of the instrument, has power to appoint trustees to exercise the discretion or power of making the beneficiaries as certain as the nature of the trust requires them to be. Uncertainty as to the individual beneficiaries is characteristic of a charitable use.

McDonald, 81 Ark. at 242, 98 S.W. at 955 (quoting 2 *Perry on Trusts*, §732).

Similarly, a trust for the relief of poverty is not required to specifically describe its charitable purpose. *Scott on Trusts*, §369.1 (1960). Consequently, trusts "for the poor," or "to aid the poor," or to "help the needy," or "for the relief of poverty" have been upheld as charitable. *Id.* See also: *Restatement (Second) of Trusts*, §369, comment b.

> A trust may be valid as a trust for the relief of poverty although in the terms of the trust it is not stated in specific terms that the beneficiaries must be poor. Thus, a trust for the benefit of "widows and orphans" is ordinarily interpreted as meaning "poor widows and orphans." Similarly, a trust for the benefit of the "oldest respectable inhabitants" of a place may be construed as including only such of them as are poor.

Restatement (Second) of Trusts, §369, comment c. See also: *Scott on Trusts*, §369.2 (1960).

A trust need not limit its benefits to those who are destitute to be considered a charitable trust for the relief

of poverty. *Scott on Trusts*, §369.3 (1960). See also: *Restatement (Second) of Trusts*, §369, comment d. Accordingly, "a trust to assist persons who have an income which does not afford the necessities of life without such assistance is charitable." *Restatement (Second) of Trust*, §369, comment d. Merchants would ask the Court to compare the similarity of language quoted from comment d of the *Restatement* to the dispositive language of the Kingsburys' trusts, "individuals or entities with financial needs that are not being adequately provided for otherwise."

Similar dispositive language was addressed by the Arkansas Supreme Court in *Curry v. Guaranty Loan and Trust Company*, 212 Ark. 988, 208 S.W.2d 465 (1948). There the will provided that the testator's residuary "be given to some foundation, or organization whose purpose is to discover a cure for rheumatism; provided that if such trustees cannot agree upon the foundation or organization engaged in such investigation, they may give and donate such proceeds to *any* charitable institution or institutions, foundation or foundations, organization or organizations, upon which they may all agree." [Emphasis added.] *Curry*, 212 Ark. at 989, 208 S.W.2d at 466. Standing alone it would appear this language does not exclude the possibility of property of the testatrix going to a corporation engaged in business for profit. However, the *Curry* court noted that, when construing a will, the intention of the testator must be ascertained by considering the entire instrument and not a single clause or sentence standing alone. Accordingly, the Court held that "[w]hen all the language of this portion of the will is given consideration and effect we think it clearly appears that the testatrix was not providing for any institution,

other than a charitable one, to become a recipient of her gift." *Curry*, 212 Ark. at 990, 208 S.W.2d at 466.

The Lancasters argue that the Appellate Court's decision is not supported by Arkansas case law. Merchants respectfully disagrees. The cases of *McDonald*, *Bakos* and *Curry* each particularly reflect the strong precedent in Arkansas supporting the result reached by the Appellate Court in this case.

Other jurisdictions have also determined that trusts with provisions similar to the provisions of the Kingsbury's trusts are charitable. For example, in *Lord v. Miller*, 178 N.E. 649, 650 (1931), the Court determined that the following provision of the decedent's will creates a valid charitable trust:

> To the said William G. Lord I give all the rest and residue of my estate but in trust never the less [sic] to be expended by him, either income, principal or both for the care comfort, support or assistance of any persons who shall appear to him to be especially in need of assistance, my desire and intention being by this trust to create a Charitable Fund for the relief of any needy cases that may come to the attention of my trustee.

The Lancasters have cited two cases from other jurisdictions to argue that the Kingsburys' trusts are not charitable. These two cases are readily distinguishable from the present case. *Fairchild v. Edson*, 154 N.Y. 199, 48 N.E. 541 (1897) was decided under New York law which required that the "class of beneficiaries should be so designated and determined that, if the executors or trustees to whom the fund is given should die before the

execution of the trust, the court could distribute the fund equally among the members of the class." *Fairchild*, 48 N.E. at 543-544, citing 1 Rev. St. P. 734, §100. The Arkansas courts and this Court have held otherwise. As set forth *supra*, "[i]f the founder describes the general nature of the charitable trust, he may leave the details of its administration to be settled by trustees under the superintendence of a court of chancery." *Curry*, 212 Ark. at 990, 208 S.W.2d at 466 (quoting Russell, 107 U.S. at 167). Obviously, neither the case law of Arkansas nor the prior decisions of this court require the definitiveness that New York law required; accordingly, the *Fairchild* case is of no precedential value here.

Goetz v. Old National Bank of Martinsburg, 84 S.E.2d 759 (1954) is also distinguishable in that it involved a mixed trust, which allowed distributions to be made to scientific corporations which were *not non-profit* entities. The Kingsburys' trusts are not mixed trusts. When construed as a whole, as the Court is duty bound to do, they limit all distributions to the relief of poverty, a charitable purpose.

Likewise, in quoting from §398(1) of the *Restatement (Second) of Trusts*, the Lancasters fail to point out the language in paragraph (2) of that section which more nearly fits the facts of this case:

> (1) Where by the terms of the trust the trustee is directed to apply the trust property to purposes which are not limited to charitable purposes but include non-charitable purposes for which a trust or power cannot validly be created, the intended trust fails altogether, *except as*

> *stated in Subsection (2),* (3) and (4). [Emphasis added.]
>
> (2) *If the settlor manifested an intention that the whole of the trust property should be applied to charitable objects unless the trustee should choose to apply a part of it to non-charitable objects for which a trust or power cannot validly be created, and his primary purpose was to apply it to the charitable objects, the power to apply the property to the other objects is invalid, and there is a valid charitable trust of the whole of the property.* [Emphasis added.]

The Lancasters have cited authorities in support of the proposition that the Kingsburys' trusts must fail because they are mixed trusts. However, the Kingsburys' trusts are not mixed trusts. As discussed above, the trusts limit distribution of the income and corpus to the relief of poverty, a charitable purpose. Thus, the authorities cited by the Lancasters on mixed trusts are not applicable here.

The Lancasters also argue that the Appellate Court decision is in conflict with the prior decisions of this Court, because they allege, the Kingsburys' trusts are not charitable trusts under the Statute of Charitable Uses, 43 Eliz., c. 4, 1601, as incorporated within the laws of the state of Arkansas by A.C.A. §1-2-119 (1987). The Lancasters cite *Wheeler v. Smith,* 50 U.S. (9 How.) 55 (1850), in support of their argument that the Kingsburys' trusts are not charitable trusts under the Statute of Charitable Uses. However, as pointed out on page 35 of the Lancasters' Petition, the Statute of Charitable Uses provides that the relief of poor people is a charitable purpose. Furthermore, the *Wheeler* case is readily distinguishable from the present case. The testamentary instrument in *Wheeler* provided that "the residue of my estate is left in trust of

Hugh Smith, Robert I. Taylor, and Phineas Janney, for such purposes as they consider promises to be most beneficial to the town and trade of Alexandria." *Wheeler,* 50 U.S. at 75. The Court pointed out that "the testator had no settled purpose as to the mode of applying his bequest to 'benefit the town and trade of Alexandria' . . . There is nothing to restrain the discretion of the trustees, or to guide the judgment of the Court." *Wheeler,* 50 U.S. at 75. By contrast, the Kingsburys' trusts provide a settled purpose as to the mode of applying the bequests and restrains the discretion of the trustees as it restricts the distribution of the trusts to "individuals or entities with financial needs that are not being adequately provided for otherwise."

Moreover, in *Russell v. Allen, supra,* a case decided after *Wheeler,* the grantor granted lands and personal property in Arkansas to the trustee "for the purpose of founding an institution for the education of youth in St. Louis County, Missouri." While upholding the trust as charitable, this Court reviewed its decisions on charitable trusts and espoused its views as follows:

> . . . trusts for public charitable purposes are upheld under circumstances under which private trusts would fail. Being for objects of permanent interest and benefit to the public, they may be perpetual in their duration, and are not within the rule against perpetuities; and the instruments creating them should be so construed as to give them effect if possible, and to carry out the general intention of the donor, when clearly manifested, even if the particular form or manner pointed out by him cannot be followed. They may and, indeed, must be for the

> benefit of an indefinite number of persons; for if all the beneficiaries are personally designated, the trust lacks the essential element of indefiniteness, which is one characteristic of a legal charity. If the founder describes the general nature of the charitable trust, he may leave the details of the administration to be settled by trustees under the superintendence of a court of chancery.

Russell, 107 U.S. at 167.

II. CHARITABLE TRUSTS ARE EXCEPTIONS TO THE RULE AGAINST PERPETUITIES.

As the Appellate Court correctly noted, a charitable trust is an exception to the rule against perpetuities and thereby is not a violation of that rule. *Lancaster,* 961 F.2d at 716 citing *Russell,* 107 U.S. at 167; *Bakos,* 260 Ark. at 626, 543 S.W.2d at 219; *Garrett,* 209 Ark. at 901-902, 192 S.W.2d at 974; *Biscoe v. Thweatt,* 74 Ark. 545, 548, 86 S.W. 432, 433 (1905); and the *Restatement (Second) of Trusts,* §365 (1959).

CONCLUSION

To establish a charitable trust, the grantor needs only to describe the general nature of the charitable trust and may leave the details to be settled by the trustees under the supervision of the chancery court. *Curry v. Guaranty Loan and Trust Co., supra.* Merchants intends to seek such supervision in the action presently pending in the Sebastian County Chancery Court.

The Appellate Court gave thoughtful consideration to the grantors' intentions, prior decisions of this Court and the Arkansas Supreme Court supporting the Appellate Court's decision. *McDonald, Bakos, Curry,* and *Russell, supra.* To reach the result sought by the Lancasters would cause the Kingsburys to die intestate, resulting in all of their estate assets (almost $1,500,000.00) to go to Mrs. Lancaster, a distant relative, who's name was never mentioned by the Kingsburys, either in their mirror image pour-over wills or their charitable trusts. There can be no doubt such a result was never intended by these grantors.

Respectfully submitted,

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